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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Request of Cellular Communications of )  
Puerto Rico, Inc. to Hold an Auction To )  
License Cellular RSA No. 727A, )  
Ceiba, Puerto Rico )

Petition for Rulemaking Re: RSAs )  
332A Arkansas 9 - Polk )  
370A Florida 11 - Monroe )  
492A Minnesota 11 - Goodhue )  
582A North Dakota 3 - Barnes )  
615A Pennsylvania 4 - Bradford )  
and other Cellular Markets for which )  
Applications Were Filed Prior to July 26, 1993 )

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RM-8897

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To: Chief, Commercial Wireless Division

Reply Comments of  
Tri-Coastal Cellular II

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December 10, 1996

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To: Chief, Commercial Wireless Division

**Reply Comments of  
Tri-Coastal Cellular II**

Tri-Coastal Cellular II ("TCC"), by the undersigned counsel, hereby files its Reply Comments in response to the Commission's Public Notice of October 24, 1996, DA 96-1685. TCC filed applications in 1988 for four of the six nonwireline cellular RSA's which the Commission proposed to relottery upon the disqualification of the initially selected winning applicant. *See Lottery Notice* of July 12, 1996, announcing the relottery of the six above-captioned named RSA's.<sup>1</sup> TCC is opposed both to the proposal

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<sup>1</sup> Lottery Notice, "FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in which Previous Winner was Defective," Mimeo No. 63896, released July 12, 1996. TCC filed applications for Markets 727A (PR 5), 332A (AR 9), 370A (FL 11) and 615A (PA 4).

of Cellular Communications of Puerto Rico, Inc. ("CCPR") to auction RSA No. 727A<sup>2</sup> and to auctioning of the other three RSA's which were included in the Commission's earlier decision to conduct a second lottery and in which TCC filed applications, as well as to auctioning of other similarly situated cellular markets. To cancel the proposed relottery and substitute an auction for these RSA's would be grossly unfair to the original RSA applicants, inconsistent with numerous other Commission determinations in similar circumstances, contrary to the public interest and unlawful.

**I. The Six RSA's Should Be Awarded By Lottery, As Originally Intended**

TCC hereby adopts the views set forth in Initial Comments filed in this proceeding by JMC Enterprises, SDK Enterprises, Donald J. Kunkle, and Formula I Cellular on November 25, 1996, and incorporates said comments herein by reference.

**II. Initial Comments Of Other Parties Do Not Offer an Equitable or Legal Basis for Auctioning the Six RSA's**

The Initial Comments in this proceeding may be bifurcated principally by the status of the Commenters: those who did not file in the initial RSA filing windows now seek to auction the six RSA's, while those who did file initially emphasize the equities of fulfilling the FCC's original commitment to lottery the markets in question. In the

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<sup>2</sup> Petition of CCPR for Declaratory Ruling or, in the Alternative, for Rulemaking ("Pet."), filed on September 9, 1996.

Comments of those who did not initially file, there is little or no discussion addressing the equities. Instead, they concentrate on two principal points: the contention that auctioning the RSA's would be more efficient, and that the adoption of the auction procedure would not constitute unlawful retroactive rulemaking. Neither argument is persuasive.

**A. The Lottery Process Would Be More Efficient than an Auction**

As noted in the initial comments of JMC Enterprises, et al., and of others, the lottery process can be concluded in one day whereas the preparation for and holding of an auction would involve a number of months. This has been the Commission's experience with auctions in other services and is likely to be the case in these instances as well.<sup>3</sup> If the Commission is concerned about the delay which could occur due to the selection of a lottery winner that is no longer in existence or no longer interested, it can choose a first and two runner-up applicants in the lottery so as to assure that, after a brief period allowing for the processing of a winning applicant, there will be no loss of momentum. Even if the Commission is required to process a second applicant because the first is no longer viable, the time involved will be much shorter than for the establishment and conduct of an auction.

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<sup>3</sup> For example, in its Public Notice scheduling the action of IVDS licenses, DA 96-1958, rel. December 4, 1996, the Commission established February 18, 1997, or more than two months in the future, for the auctions merely to begin.

While original applicants understandably desire the rapid grant of RSA licenses under the present circumstances, TCC recognizes that it is the public interest which is paramount. It is lotteries which best assure that the public has the benefit of cellular service at the earliest possible opportunity.

**B. The Commission Lacks Legal Authority to Hold An Auction In the Present Circumstances**

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As indicated in the Initial Comments of JMC Enterprises, et al, Section 309(j) of the Act does not give the Commission legal authority to conduct auctions in the present circumstances. No Initial Comments provide a convincing argument that the Commission does have such authority. As JMC Enterprises and other Commenters (e.g., Brown Nietert and Kaufman, Chtd.) have shown, disposing of the pending RSA applications by auction would constitute unlawful retroactive rulemaking and is therefore beyond the Commission's authority. Bell Atlantic Nynex Mobile, Inc. ("BANM"), in its Initial Comments, contends that the Commission does have such authority.

In doing so it relies on *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987), quoting the court's observation that "the Commission's decision to apply the lottery in the Fresno market to applications that were already filed was within its statutory authority and was fully justified." *Id.* at 1556. But BANM ignores the facts of that proceeding and the court's reasoning in sustaining the use of lotteries for pending cellular applications. The court first noted that the application of retroactive rulemaking involves balancing of injury to the complaining party against injury to the public interest.

*Id.* at 1554-5. It then analyzed the claims of injury from Petitioner Portaphone and noted that the applicant would actually be advantaged by the decision not to hold comparative hearings. The court also noted that Portaphone was on notice when it filed its application that lotteries might be substituted for comparative hearings. The court then concluded that Portaphone suffered no imposition “of new and unexpected liabilities or obligations... .” *Id.* at 1555-6. The court was also impressed in *Maxcell* by the Commission’s contention that lotteries would allow it to dispose in an efficient manner of the large numbers of RSA applications then pending. Given the circumstances faced by the Commission, the court concluded that the required balancing of factors easily favored the Commission’s decision to rely on lotteries.

The present circumstances are not remotely analogous. The existing RSA applicants have been waiting 8 years, through no fault of their own, for the Commission to fulfill its commitment to choose RSA licensees in the subject markets by lottery. When the applications were filed in 1988, the Commission had no auction authority whatsoever. The limited number of RSA’s which require relotteries poses no great processing challenge to the Commission. Finally, the decision to proceed by auctions would work a severe injury on the initial RSA applicants, who never contemplated having to commit large sums of money to win a license by auction. In these circumstances there is no benefit to the public in auctioning other than raising money for the Treasury - a factor explicitly disallowed by the auction statute in section 309(j)(7)(A).

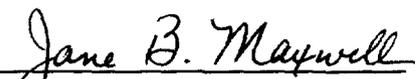
WHEREFORE, TCC urges the Commission to proceed with rlotteries and reject the proposal to auction those RSA's which are the subject of this proceeding and in which TCC filed applications, as well as all other RSA's in which applications were filed prior to July 26, 1993 and in which the original lottery winner is disqualified.

Respectfully submitted,

TRI-COASTAL CELLULAR II

Date: December 10, 1996

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments of Tri-Coastal Cellular II was sent by U.S. mail postage prepaid this 10th day of December, 1996 to the following:

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